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No. 93-1576

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED TEXAS TRANSMISSION COMPANY, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, AND JEFFERSON COUNTY (TEXAS) DRAINAGE DISTRICT NO. 6

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The United States Army Corps of Engineers issued permits to petitioner's predecessors in interest which authorized them to build and maintain two pipelines across the navigable waters of the United States. The permits were each issued subject to the condition that "if future operations by the United States require an alteration in the position or the structure or work herein authorized," the changes so required would be performed by the permittee without expense to the United States.

Years later, the Corps commenced a project that required changes in the location of petitioner's pipelines, both within, and to some extent outside, the present channel. The Corps directed petitioner to relocate the pipelines. Petitioner, however, refused to do so unless it first received assurance that it would be reimbursed for all, or almost all, of the relocation costs. Although the Corps informed petitioner that its position violated the permits, petitioner adhered to its position. Eventually, the Corps cancelled the permits.

The question presented is whether the Corps of Engineers properly cancelled the permits due to the permittee's refusal to relocate the pipelines unless it first received assurances that it would be reimbursed for costs of relocation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16-41) is reported at 7 F.3d 436. The memorandum opinion of the district court (Pet. App. 42-48) is reported at 772 F. Supp. 952.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1993. A petition for rehearing was denied on January 5, 1994 (Pet. App. 1). The petition for a writ of certiorari was filed on April 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT [1]

1. Petitioner maintained two pipelines across Hillebrandt Bayou, a navigable water of the United States, in Jefferson County, Texas. A 20-inch pipeline was installed pursuant to United States Army Corps of Engineers (Corps) Permit 1728, issued on November 13, 1951, to United Gas Pipeline Company, petitioner's predecessor in interest. A 16-inch pipeline was installed pursuant to Corps Permit 3779, issued in March 1957 to Humble Oil and Refining Company, also a predecessor in interest to petitioner. Both permits contained Condition (F) (Pet. App. 89), which required permittees to remove, relocate or alter the structural works "if future operations by the United States require an alteration in the position of the structure or work herein authorized." *Id.* at 50.

2. On October 27, 1965, Congress authorized construction of the Taylors Bayou Flood Protection Project in Section 204 of the Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1074, 1078 (Pet. 4). The Taylors Bayou Project is designed to alleviate serious flooding problems in southeastern Texas (Pet. App. 17).

On August 22, 1972, the United States and Jefferson County Drainage District No. 6, the Project's local sponsor, entered into a Local Cooperation Agreement[2]

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[1] The facts in the following statement are, except as otherwise noted, taken from the Finding of Fact made by the District Engineer. Those Findings of Fact are reproduced at Pet. App. 49-75.

[2] Such an agreement is a statutory prerequisite to construction of a federal flood control project. Under the agreement, the local sponsor assumes certain specified responsibilities identified in Section 3 of the Flood Control Act of 1936, 33 U.S.C. 701c,

concerning the Project. This agreement set forth the terms upon which the federal government and the District were to cooperate in constructing the Project.

In the late 1980's, when work began on the Hillebrandt Bayou portion of the Project, the Corps notified petitioner that the Project involved realigning, widening, and deepening portions of the Hillebrandt Bayou, and that petitioner's two pipelines would interfere with construction of the Project. Accordingly, the Corps notified petitioner in February 1987 that, if it desired to continue to maintain its pipelines across the Bayou, the pipelines would be required to be lowered because they interfered with Project specifications. Those specifications mandated "that existing pipelines that are not at least 5 feet below the design depth of the channel over the bottom width plus a distance of 25 feet on each side will have to be lowered" and that "[a]ny relocated pipelines are required to be at least 10 feet below the design depth of the channel over the bottom width plus a distance of 25 feet on each side." Gov't C.A. Br. 8.

The Corps also advised petitioner that the relocation of the pipelines would have to be accomplished at no cost to the government in accordance with permit Condition (F) and pursuant to the dominant servitude held by the United States with regard to the navigable waters of the United States, of which Hillebrandt Bayou is a part.

The Corps again notified petitioner, by letters dated April 20, 1988, and July 5, 1988, that it would be required to relocate its pipelines at no cost to the United States in order for the Project to be constructed. Petitioner did not dispute that the current locations of its pipelines

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including responsibility for the costs of any necessary relocations of facilities.

conflicted with Project specifications within the navigable waters of Hillebrandt Bayou. It also recognized the Corps' jurisdiction over the navigable waters of the Bayou and its attendant obligation to relocate those portions of its pipelines in the navigable waters. Petitioner advised the Corps and the District, however, that it would not relocate its pipelines until it was assured of compensation from the Drainage District for the costs of relocation for at least the portion of its pipelines that were outside the navigable waters of the Bayou.[3]

On February 13, 1989, the Corps determined that petitioner's refusal to lower the pipelines was interfering with completion of the Project. Pursuant to 33 C.F.R. Pt. 325, the Corps instituted proceedings to address petitioner's violation of the permit conditions. The first step in this procedure was the temporary suspension of the relevant pipeline permits. Accordingly, by letter of February 14, 1989, the District Engineer notified petitioner that its permits were suspended as of that date. The suspension letter advised petitioner of its right to request a public hearing, after which appropriate action would be taken to reinstate, modify, or revoke the permits, and that if the permits were revoked,

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[3] The exact extent to which the requisite relocation work would involve portions of the pipelines situated in the existing channel was not determined by the courts below. Throughout this litigation, petitioner has been inconsistent and imprecise concerning the extent to which it sought assurances that it would be reimbursed for its relocation costs. At times petitioner asserted that it was entitled to be compensated for all costs associated with the relocations, while at other times it at least implicitly acknowledged its responsibility for bearing a portion of the relocation expenses. See Pet. App. 47, 54-56.

the pipelines would have to be completely removed from the waterway at petitioner's expense.

Petitioner requested a public hearing, which was held on June 28, 1989. Petitioner's position was presented at this hearing, as well as in petitioner's follow-up letter of July 7, 1989. Petitioner stated that it recognized and continues to recognize the Corps' jurisdiction over the navigable waters of Hillebrandt Bayou, and that it was willing to "relocate its pipelines within the Bayou to the extent necessitated by the current Taylors Bayou flood control project and to bear all costs of such relocation." Pet. App. 61.

Petitioner maintained, however, that because the Project involved widening as well as deepening Hillebrandt Bayou, pipeline relocation was "necessary 'within the bayou and outside the bayou.'" Pet. App. 61. Petitioner insisted that a "partial relocation" of the pipelines "within the streambed of Hillebrandt Bayou" would be "a futile exercise that would not advance the progress of the flood control project." *Ibid.* The letter also stated that petitioner "cannot be in noncompliance with its permits if the purported acts of compliance would not satisfy the demand on which the Corps bases its permit suspension and revocation actions." *Ibid.* Petitioner contended that, under the Flood Control Act of 1965 authorizing the Taylors Bayou Project, it was entitled to compensation for pipeline relocation supposedly outside the Hillebrandt Bayou. Ignoring possible Tucker Act, 28 U.S.C. 1491, remedies in what is now the Court of Federal Claims, petitioner also asserted that revocation of the permits would coerce petitioner into proceeding with relocation demands and surrendering its constitutional rights to compensation from the Drainage District for the supposed taking of its private property rights outside the Bayou.

3. Before any further action was taken by the Corps concerning the permits, petitioner on July 20, 1989, filed a complaint in the United States District Court for the Southern District of Texas against the Corps and the Drainage District, challenging the suspension and threatened revocation of the permits. On motions of the Corps and the District, venue was transferred to the Eastern District of Texas.

On August 13, 1990, the District Engineer issued his determination regarding petitioner's permits. The District Engineer ruled that, pursuant to 33 C.F.R. 325.7, the public interest would best be served by revocation of the permits so that work on the Taylors Bayou Project could continue. After revocation, the Corps notified petitioner that it must remove its pipelines from Hillebrandt Bayou.

On October 15, 1990, the United States filed in the district court a counterclaim against petitioner seeking an order requiring petitioner to remove the pipelines and for damages. All parties filed motions for summary judgment. The sole issue raised by petitioner's motion for partial summary judgment was that the Corps' use of its permit power to revoke petitioner's permits resulted in a taking of petitioner's property rights under the Fifth Amendment. The United States' summary judgment motion, relying upon Section 12 of the Rivers and Harbors Act of 1899, 33 U.S.C. 406, sought an order directing petitioner to remove its pipelines from Hillebrandt Bayou.

The district court denied petitioner's motion for summary judgment, granted the United States' request

for injunctive relief, and directed that petitioner remove its pipelines from the Bayou.[4] Petitioner appealed.

4. The court of appeals affirmed, holding that petitioner had no legal justification for failing to comply with the Corps' order directing the relocation of the pipelines to accommodate the project, and thus the Corps did not abuse its discretion in revoking the permits after petitioner failed to comply. The court also held that, as a consequence of the revocation of the permits, petitioner lost the opportunity to relocate its pipelines, leaving itself no alternative but to remove the pipelines that conflicted with the project specifications.[5]

ARGUMENT

The petition for a writ of certiorari does not present any important issue of federal law, does not involve a conflict in decisions between courts of appeals, and does not present any question warranting review by this Court.

1. Petitioner contends that the Corps acted beyond its statutory authority in seeking to have petitioner relocate its pipelines without first assuring petitioner of compensation for costs associated with that move. There is no reason for this Court to consider that contention, however, because petitioner's claims on that score are either moot or beyond the district court's jurisdiction.

A case becomes moot, and thus nonjusticiable, "when the issues presented are no longer 'live'." *United States*

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[4] The court also severed an unresolved Freedom of Information Act claim and the defendants' remaining counterclaims from this case. See Gov't C.A. Br. 1-2, 4 n.2.

[5] The court of appeals (Pet. App. 36), in *dicta*, concluded that the Corps' revocation orders would result in a taking of petitioner's property interests in pipeline located in substantial areas outside of the permitted area.

Parole Comm'n v. *Geraghty*, 445 U.S. 388, 396 (1980). As the court of appeals noted (Pet. App. 23 n.9), the removal of the two subject pipelines from the waterway was completed in July 1992.[6] Thus, there is no effective injunctive relief that any court can grant as to those pipelines, even if the Corps were found to have exceeded its authority. Any ruling by this Court would be, at best, an advisory opinion.

Reduced to its essentials, this case now (as before the court of appeals) involves only a claim by petitioner for monetary compensation. In its motion for partial summary judgment, the sole issue raised by petitioner against the Corps was a demand that it be assured of compensation:

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[6] On June 1, 1993, the court of appeals, *sua sponte*, ordered the counsel of record to file an "agreed fact statement, to be submitted jointly," regarding "the current status of the pipelines and a portion of the widening and deepening project in the vicinity of the pipelines, i.e., whether that part of the work is still on hold or has gone forward." The statement, dated June 9, 1993, states in relevant part:

> Removal of [petitioner's] 16" pipeline was completed on April 29, 1992.
>
> Removal of [petitioner's] 20" pipeline was completed on July 2, 1992.
>
> As of the date of this stipulation, Hillebrandt Bayou at the former location of the 16" pipeline has not been dredged or otherwise altered to meet the project specifications.
>
> As of the date of this stipulation, Hillebrandt Bayou at the former location of the 20" pipeline has not been dredged or otherwise altered to meet the project specifications.
>
> As of the date of this stipulation, that part of the work is not on hold.

> [Petitioner] is entitled to judgment as a matter of law as to the following issue[] in this case: * * *
>
> The United States Army Corps of Engineers' * * * wrongful use of "permit power" under § 10 of the Rivers and Harbors Act of 1899, in an attempt to compel [petitioner] to relocate its pipelines without assurance of * * * compensation from the Drainage District.

Indeed, the district court stated that the only question to be decided was, "[W]hat entity is responsible for paying to relocate or alter pipelines constructed in an area that is now the subject of a federal flood control project?" (Pet. App. 45). The district court, however, had no jurisdiction to adjudicate a claim for compensation by petitioner against the United States.

Under the Tucker Act, 28 U.S.C. 1491, any such claim in excess of $10,000 must be brought in the Court of Federal Claims. Since the relocation of the pipelines was sought by the United States, it would be responsible, at least initially, for relocation costs if any were owed. And, because the amount in controversy exceeded $10,000,[7] petitioner filed its suit for monetary relief in the wrong court.[8] Consequently, the Tucker Act provides the sole remedy for any Fifth Amendment

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[7] The court of appeals noted (Pet. App. 19) petitioner's representation that the amount in controversy was $1,060,000. See also Pet. C.A. Br. 5.

[8] For this reason, petitioner's arguments (Pet. 25, 26) that the court of appeals' decision is contrary to this Court's opinion in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), is in error. Contrary to petitioner's reading of *Kaiser*, "[t]he Fifth Amendment does not require that compensation precede the taking." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984) (citing *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932)).

taking alleged to have been committed by the United States, *Preseault* v. *ICC*, 494 U.S. 1, 13 (1990), and the removal of the pipelines by petitioner moots any equitable claim that the actions of the United States complained of here were unauthorized.[9]

2. Jurisdictional matters aside, petitioner could not validly postpone relocation work required by Condition (F) based on its outstanding demand for assurances from the Drainage District that it would be reimbursed for its relocation expenses, either in whole or in part. This refusal violated Condition (F) of the permits. Condition (F), Pet. App. 89, requires permittees to "remove or alter" their permitted structures whenever "operations by the United States" so require. The "operations by the United States" in this case were activities performed in furtherance of the Taylors Bayou Flood Control Project, and the specifications for that project required relocation of the pipelines—both within the existing channel and elsewhere.

3. Petitioner's contention (Pet. 25-26) that Condition (F) did not apply with respect to any portion of its pipelines supposedly on fastlands outside such navigable

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[9] Because petitioner's claims on the merits are not worthy of review, the procedure applicable to cases that become moot while pending in this Court (see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950)) is inapplicable, and certiorari should simply be denied. See U.S. Br. in Opp. at 5-8, *Velsicol Chem. Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900); see also U.S. Br. as Amicus Curiae at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (No. 92-1123). While the court of appeals in this case could appropriately have vacated the district court's judgment as moot, the petition for certiorari does not present that claim and it therefore should not be considered by this Court. Sup. Ct. R. 14.1(a).

waters misses the mark.[10] It was established in the administrative record, and particularly in the District Engineer's Statement of Findings (Pet. App. 49-75), that petitioner was *not* in compliance with its permits *within* the navigable waters of Hillebrandt Bayou subject to Project specifications, a point which petitioner never disputed before the Corps.[11] Petitioner's refusal to relocate any portions of its pipelines was based on its claim that it need not do so until it was assured of compensation for the relocation costs, notwithstanding the permit conditions. This refusal was, as the court of appeals found, a sufficient basis for permit revocation, regardless of the exact extent of navigable waters in the Bayou. Hence, petitioner was in error in refusing to comply with Condition (F) unless it received prior assurances that it would be compensated for the relocation work necessitated by the project.[12]

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[10] This purely factual issue also does not warrant review. As discussed above, that issue is moot because petitioner has completed the removal of the pipeline. Additionally, the district court concluded that the Corps' order affected, at most, "incidental work" on lands adjoining the Bayou. Pet. App. 47. Consequently, the court only ordered the "removal of the pipelines pursuant to the valid revocation of the permits." *Id.* at 48.

[11] The administrative record states that both of petitioner's pipelines were "at least five (5) feet below the bed of the waterway." Gov't C.A. Br. 24 (quoting R.E. Tab E 12). Additionally, "[t]he record of this case clearly proves that the lateral extent of Hillebrandt Bayou, subject to the servitude, encompassed essentially all of the area in which the Corps initially requested petitioner to lower its pipelines. Petitioner presented no evidence at all in rebuttal." *Id.* at 21-22. See also *id.* at 30-33.

[12] Petitioner also suggests (Pet. 27 n.16) that the Corps cannot impose conditions in a permit issued pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, unless those conditions directly pertain to navigational matters. Petitioner's

4. Petitioner is also wrong in asserting (Pet. 22) that it has any rights under Section 3 of the Flood Control Act of 1936, ch. 688, 49 Stat. 1571, 33 U.S.C. 701c, or under the Local Cooperation Agreement between the Corps and the Drainage District, to receive compensation for relocation activities which could otherwise be compelled by the Corps under its Condition (F) authority. The clear purpose of the Act and the Local Cooperation Agreement in regard to payment for relocation of utilities was to insure that the United States would not ultimately be responsible for certain costs. Section 3 merely provides that the local sponsoring authorities must give the Corps assurances that they will provide "without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project." Petitioner has not shown, and cannot show, that the Act or the agreement requires the local sponsor to provide prior assurances to utilities such as petitioner that it will reimburse them for relocation costs. As to the agreement here, the district court correctly observed (Pet. App. 47) that:

> a reasonable interpretation of that agreement only requires that the District pay to acquire those rights-of-way or easements that are not acquired through the power of the Corps, the District's

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suggestion is incorrect. The Corps may deny applications for Section 10 permits for reasons unrelated to navigation. *United States* v. *Alaska*, 112 S. Ct. 1606, 1611-1613 (1992); *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352 (1933); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). If the Corps may deny a Section 10 permit request as an initial matter for concerns unrelated to navigation, then it follows that the Corps can also grant the request subject to conditions unrelated to navigation. *Alaska*, 112 S. Ct. at 1618.

partner, and jointly responsible for execution of the Congressional mandate that the project be completed.

Further, the statute and the Local Cooperation Agreement are for the sole benefit of the United States and do not inure to the benefit of petitioner. If the United States was initially required to pay for any relocation of pipelines, it might by this agreement be able to recover those sums from the Drainage District. But, as just mentioned, federal law does not require the District to provide prior assurances that it will reimburse petitioner for any costs in connection with the Project. Accordingly, petitioner is not a third party beneficiary of the statute or agreement and it cannot maintain an action thereunder against the District. See *Berberich* v. *United States*, 5 Cl. Ct. 652, 656-658 (1982), aff'd mem., 770 F.2d 179 (Fed. Cir. 1985) (Table).

5. Petitioner's reliance (Pet. 26-29) on *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), is misplaced. In *Nollan*, this Court held that a state governmental entity could not circumvent the Fifth Amendment's obligation to pay just compensation for taking of private property for public use through the device of making permits for the rebuilding of structures on private beachfront lots conditional upon the granting of public access to the beach. In the current litigation, however, the court of appeals did not find that the federal government could avoid all potential takings liability by making a permit to install a portion of a pipeline in the navigable waters conditional on absolving the United States from any future liability for the costs of relocating all portions of that pipeline outside of the navigable waters. To the contrary, the court of appeals specifically found (Pet. App. 34) that, under petitioner's permits, "the government is clearly obliged to pay the expense of

substantial relocations wholly outside the original banks." Hence, *Nollan* has no application in the present suit.

6. Finally, petitioner incorrectly asserts (Pet. 25-26) that the court of appeals' decision here conflicts with the Eleventh Circuit's opinion in *United States* v. *Harrell*, 926 F.2d 1036 (1991), which addressed whether a certain tributary of a navigable river was itself navigable. Because the court of appeals here did not hold, as petitioner argues, that the navigation servitude extends to fastlands, *Harrell* has no relevance here. Indeed, the authorizing Act in this case explicitly states a navigational purpose. Flood Control Act of 1965, Pub. L. No. 89-298, § 204, 79 Stat. 1074 ("The following works of improvement[, including the Taylors Bayou Project,] for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted."). See Gov't C.A. Br. 42.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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